

63379-1

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NO. 63379-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

MARY BYRD,
Plaintiff/Respondent

v.

BARMOR TEMPORARIES, INC., a Washington corporation, d/b/a
BARMORE PERSONNEL, and CAROL BARMORE and JOHN DOE
BARMORE, wife and husband, and the marital community thereof,

Defendants/Appellants

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
CLERK



BRIEF OF RESPONDENT

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Respondent Mary Byrd (“Byrd”) submits the following brief in response to the arguments of the Barmore Appellants.

I. COUNTER STATEMENT OF THE CASE

This matter has come on for appeal after the trial court's granting of Summary Judgment and succeeding Entry of Judgment and CR54b findings on Respondent's Motion for Summary Judgment and subsequent denial of Appellant's Motion for Reconsideration and Appellant's Objection to Entry of Judgment. CP 22, 24-26, 29-30, 34-35.

Respondent, Mary Byrd, was employed by Appellants as a sales representative commencing in February, 2006 pursuant to an "employment agreement" which was nothing more than a non-compete agreement. Her compensation was a base salary plus commissions for all sales which she made, regardless of the time of delivery or payment. CP 1, 8, 12.

Ms. Byrd terminated her employment with Appellants on April 20, 2007. At the time of her termination, Ms. Byrd was owed commissions for the sales she had made during the months of February, March, and April, 2007. CP 1, 8.

After the next regularly scheduled pay day had come and gone and she had not received any of her compensation, Ms. Byrd began asking Appellants for payment of her commissions and copies of her commission

records. However, despite repeated demands, no payment was ever forthcoming. CP 1, 8.

On October 5, 2007, eight months after Ms. Byrd's termination, Appellants' counsel at the time, Wershow & Ritter¹, sent a demand letter to Appellants on Ms. Byrd's behalf which clearly stated the months remaining unpaid and the five accounts from which the monies were due. CP 12, Exhibit C. Ms. Byrd knew that the Appellants had received the monies because she had contacted those five accounts and been informed that they had paid Appellants. CP 12. The Wershow letter also cited WAC 296-126-050 as authority for the demand that Appellants provide Ms. Byrd "with all of your records regarding her pay" . . . and . . . "her commission reports for the months aforementioned and her entire personnel file." CP 12, Exhibit C.

In response to the demand letter, Appellants' executive, Carol Barmore, wrote Ms. Byrd a letter and told her to cease demanding her unpaid compensation or Appellants would file suit against her. CP 12, Exhibit D. Furthermore, Appellants did not provide any of the lawfully requested records or reports.

¹ Wershow & Ritter were actual corporate counsel for Appellants at the time. They subsequently discovered the conflict and declined to offer further representation to the Respondent.

On Ms. Byrd's behalf, present counsel wrote to Appellants in February, 2008, and again demanded payment of Ms. Byrd's unpaid commissions and requested copies of Ms. Byrd's payroll records and commission reports. Through new counsel, Appellants responded by again threatening a lawsuit if Ms. Byrd continued to press her claims. CP 20, Exhibit A.

Despite repeated reasonable demands, no payment or records were every forthcoming from Appellants, and as a result, suit was commenced by service of process in July, 2008, and filed with the Court in September, 2008. CP 1, 11, 20. A Motion For Summary Judgment was subsequently filed in October, 2008. CP 7. The reasons for filing a Summary Judgment motion rather than a Motion for Default were explained in a letter to Appellants counsel. CP 20, Exhibit C.

On October 15, 2008, some three months after service of the Complaint, a week after service of the Motion for Summary Judgment, and 20 months after Ms. Byrd's termination of employment, counsel for Ms. Byrd received a UPS Ground delivery which contained a check dated May 9, 2008 in the amount of \$12,526.55. However, there were no records or explanation of what the amount represented and the check clearly stated on its face that it was "Void after 30 days." CP 11, Exhibit A.

II. ARGUMENT

A. Appellants' Withholding of Wages Was Willful

RCW 49.52.050(2) provides that any employer who willfully withholds an employee's compensation shall be guilty of a misdemeanor and shall be liable for double damages.

For the purposes of RCW 49.52.050(2), non-payment of wages is willful when it is not a matter of mere carelessness, **but the result of a knowing and intentional action.** *Ebling v. Gove's Cove*, 34 Wn. App. 495, 500 (1983); *Chelius v. Questar Microsystems*, 107 Wn. App. 678 (2001) (an employer's nonpayment of wages is "willful" if nonpayment is the result of a knowing and intentional act of the employer); *Chelan Co. Dep. Sheriff's Ass'n. v. Co. of Chelan*, 109 Wn.2d 282, 300 (1987).

Furthermore, even if only a part of the salary is in dispute, failure to pay the money owed which is not in dispute warrants exemplary damages under RCW 49.52.070. In *Brandt v. Impero*, 1 Wn. App. 678 (1969), the Court upheld an exemplary damage award under the statute for wages withheld from a group of employees, even though there was a controversy about whether a smaller discreet part of the wages were owed. As stated in the dissenting opinion of Judge Dore in *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 662 (1986), "To do otherwise would

allow a large company to use its economic clout to coerce its employees into accepting smaller settlements for disputed amounts by withholding undisputed salary. The clear purpose of RCW 49.52.070 would be defeated and I am deeply dismayed that the majority countenances such a result."

In *Schilling v. Radio Holdings, Inc.* 136 Wn.2d 152, 157-159 (1998), where double damages and attorney fees were awarded to a former employee, the Court stated, "In RCW 49.48, the Legislature mandated that employers pay employees all wages due upon the conclusion of the employment relationship and banned all withholding or diversion of wages by employers unless specifically approved by statute." *Schilling* at 157. "By providing for costs and attorney fees, the Legislature has provided an effective mechanism for recovery even where wage amounts wrongfully withheld may be small." *Id.*, at 159. "The fundamental purpose of the legislation . . . is to protect the wages of an employee against any diminution or deduction therefrom by rebating, underpayment, or false showing of overpayment of any part of such wages. The aim and purpose of the act is to see that the employee shall realize the full amount of the wages which . . . he is entitled to receive . . . and that he is not deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages." *Id.*, quoting *State v. Carter*, 18 Wn.2d

590, 641 (1943). The statute is to be construed liberally to advance the Legislature's intent to protect employee wages and assure payment. Id.

Respondent Byrd's cause of action was brought pursuant to the statutory scheme of chapters 49.48 and 49.52 RCW. Under RCW 49.48.010, an employer must pay an employee who was discharged or who quits and must do so at the end of the regularly established pay period. Failure to do so is a misdemeanor. RCW 49.48.020.

Ordinarily, the issue of whether an employer acts "willfully" for purposes of RCW 49.52.070 is a question of fact. However, where there is no dispute as to the material facts, the matter may be resolved at summary judgment. *Schilling*, at 150 (citations omitted); *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 79-80 (2008). Specifically, when reasonable minds could reach but one conclusion from the evidence presented, questions of fact may be determined as a matter of law. Id.

Appellants knew fully well that they owed Ms. Byrd money for wages. They have even admitted such in their letters and pleadings. CP 8, Exhibit B; CP 12, Exhibit D. Yet, they withheld the entire amount of wages, even the amount that they fully acknowledged was due. Clearly, reasonable minds can reach but one conclusion, namely, that Appellants

had no reason to delay and withhold the portion of the wages that they did not dispute.

Appellants' proffered explanation for their delay is merely that they were waiting for Ms. Byrd to send her records and accounting that would justify the amount she claimed. However, this is a specious explanation because Appellants did not need any records to send Ms. Byrd the undisputed portion of the wages at once. Moreover, Appellants had direct and immediate access and control of all of the records and accountings withheld from Ms. Byrd despite repeated requests, records and accountings which could have been used to easily determine the amount due and owing.

In *Brandt v. Impero, supra*, at 680, the employer argued that the failure to pay wages was not with the intention of depriving the employee of any part of his wages, but was due to the defendants' uncertainty as to the amount because of scattered records concerning the wages due. In upholding the trial court, the court of appeals stated that There was sufficient evidence to show that the defendants **made no genuine effort** to keep a proper record of their payroll account with the plaintiff or to determine by audit the correct amount of the wages owing. *Id.* (emphasis added). In affirming the holding in *Brandt*, the Supreme Court pointed out that the word "willful", as used in RCW 49.52.050, means merely that the

person knows what he is doing, intends to do what he is doing, and is a free agent. *Id.* at 681. (Citations omitted).

In reference to record keeping, the Court in *Hisle v. Todd Pacific Shipyards Corp.*, 113 Wn. App 401, 420 (2002), stated that "An employer has a corresponding duty to maintain accurate records of each employee's hours worked, rate of compensation, and amount paid. RCW 49.46.070." Obviously, the Appellants seriously shirked that duty. Furthermore, it is not the duty of the employee to keep records and prove what she's owed, it is the duty of the employer to keep accurate records, to provide those to the employee when requested to do so as required by law, and to promptly pay the employee monies owed. That's what the statutory scheme is all about and that's what the cases say.

Moreover, **it was never Appellants' intention to pay Ms. Byrd.** In a letter dated October 8, 2007, Defendant/Appellant Carol Barmor stated that "I will pursue all legal remedies against you, unless you are willing to waive your commission for the above mentioned months." CP 12, Exhibit D. Such language clearly demonstrates **willful intent.**

Thus, pursuant to RCW 49.52.070, Ms. Byrd is entitled to double damages.

B. There Is No Bona Fide Dispute

Generally, employers have not been found to be willfully withholding wages within the meaning of RCW 49.52.070 when the employer has a *'bona fide'* belief that he or she is not obligated to pay. *Cameron v. Neon Sky, Inc.*, 41 Wn. App. 219, 222, 703 P.2d 315 (1985). Also, if there are statutory grounds for not paying wages, an employer may withhold wages without incurring penalties. *Pope v. Univ. of Wash.* 121 Wn.2d 479 (1993) (University's deduction of social security was not a willful withholding of wages as a matter of law). However, those cases almost universally deal with situations where a lawful deduction of some sort is involved.

In order to be deemed not willful due to a *bona fide* dispute, an employer's nonpayment of wages must be a "fairly debatable" dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid. *Schilling, supra*, at 161. A bona fide dispute does not exist if the employment relationship or the amount of the wages owed is not "fairly debatable."

In the case at bar, it is uncontroverted that Appellants' failure to pay Ms. Byrd's commissions was not out of carelessness or error. Nor was Ms. Byrd's employment relationship with Appellants challenged. Rather, Appellant's contention is that a *bona fide* dispute exists over whether it

was obligated to pay or how much it was obligated to pay. Appellants contend that Ms. Byrd failed to provide them with the amount of her commissions and therefore, they did not know how much she should be paid.

This is not a "fairly debatable" rationale for disputing and withholding an employee's earned commissions. It is a **contrived one**.

In *Ebling, supra*, the court determined that there was no *bona fide* dispute regarding commission amounts actually owed the sailboat salesman and upheld double damages. *Ebling*, at 502. In that case, the Superior Court had determined that Ebling was entitled to the full 35% commission on the sales for which he had not agreed to a reduced commission. *Cf. Department of Labor & Industries v. Overnite Transportation Co.*, 67 Wn. App. 24, 34-36, 834 P.2d 638 (1992) (An employer's asserted legal argument that its truck drivers' overtime wages should not be paid because the state's overtime wage laws are preempted by the federal Motor Carrier Act are not "fairly debatable").

The issue of whether an employer has acted willfully and with intent under RCW 49.52.050(2) and .070 is generally a question of fact. *Schilling, supra*, at 160 (citations omitted). However, where there is no genuine dispute as to the material facts and reasonable minds could reach but one conclusion from the evidence presented when the motion for

summary judgment is heard, the question may be determined as a matter of law. *Id.*; CR 56(c).

To hold Appellants liable as a matter of law requires evidence that they acted willfully and with intent to deprive Ms. Byrd of her earned commissions. But to find such evidence, courts do not require anything more than evidence that the employer "knows what it is doing, intends to do what it is doing, and is a free agent." *Schilling, supra*, at 160. Thus, An implausible rationale proffered by an employer for failure to pay wages owed to an employee will support a finding that there is substantial evidence of a willful and intentional deprivation of wages. *See Ebling, supra*, at 500-502; *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 12, 37, 111 P.3d 1192 (2005).

Appellants rationale for nonpayment of Ms. Byrd's wages is not and has never been "fairly debatable." See CP 12, Exhibit D; CP 20, Exhibit A. Clearly, they had not intention of paying her. Thus, their claim to having withheld payment for over 30 months due to a '*bona fide*' dispute is an undisguised attempt to contrive an excuse for refusing to pay Ms. Byrd her lawful commissions.

Again, pursuant to RCW 49.52.070, Ms. Byrd is entitled to double damages.

C. There Is Ample Evidence To Support The Trial Court's Findings.

Appellants argue that there is no evidence or reasonable inference from the evidence to justify the Court's decision in awarding Ms. Byrd her claimed compensation. Interestingly, Appellants do not deny that they never paid Ms. Byrd her compensation nor that they are liable for double damages. They only dispute the amount. However, they have offered no evidence to refute Ms. Byrd's claim.

There is ample unrefuted evidence to sustain the Judgment. The Complaint states that "Ms. Byrd's employment with Defendants terminated April 20, 2007. At the time of termination, Ms. Byrd was owed compensation, including earned commissions, in the amount of \$18,000.00. Although Ms. Byrd has repeatedly asked for payment, both verbally and in writing, as of the date of this Complaint, those monies have not been paid." CP 1, ¶ 3.4.

Carol Barmore sent a letter dated October 8, 2007, in which she stated that the months for which commissions were still due and owing were February, March, and April 2007. CP 12, Exhibit D.

Although Carol Barmore and Barmore Personnel have steadfastly refused to provide Ms. Byrd with her commission reports, payroll records, and personnel file pursuant to WAC 296-126-050 and other relevant law, Ms. Byrd was able to calculate her commission demands based upon the

payroll documents in her possession. The unpaid amount due and owing totaled \$18,000.00. CP 12, Exhibits E-G. In addition to Ms. Byrd's Declarations with attached exhibits that amount is supported by the other Declarations and attached Exhibits, which provide the trial court with substantial evidence to come to the conclusion that the amount owed was what Byrd claimed. *Brandt v. Impero, supra.*; *Edwards Cont'rg v. Port of Tacoma*, 7 Wn. App. 883, 889, 503 P.2d 1133 (1972).

Correspondingly, although Appellants are in exclusive possession of all the necessary records, spreadsheets, and other documentation regarding employee compensation, they did not provide any documentation or records of any kind to dispute the claimed amount.

D. Respondent Is Entitled To Attorney's Fees On Appeal.

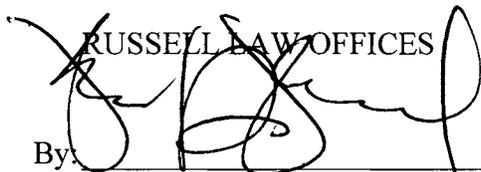
RCW 49.52.070 provides that an employer who violates RCW 49.52.050(2) is liable for costs of suit and a reasonable sum for attorneys' fees.

The provision for costs and attorneys' fees is intended to prevent the wrongful withholding of wages and to provide a remedy thought adequate for that purpose. Appellants willfully, and without legal excuse, withheld commissions owed to Ms. Byrd. Thus, Ms. Byrd respectfully requests an award of attorney's fees pursuant to RAP 18.1.

III. CONCLUSION

For all the reasons stated above, this case should be remanded to the trial court for an award of attorney's fees and penalties under RCW 42.56.550(4). The Court should also award Byrd's attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 14th day of September, 2009.

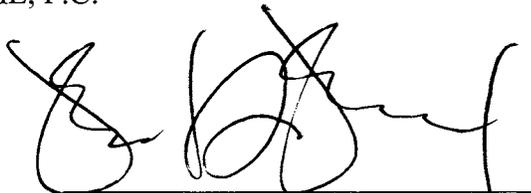

By: _____
Robie G. Russell, WSBA No. 20579
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Certificate of Service

I, the undersigned, certify that on the 14th day of September, 2009, I caused to be served, a true and correct copy of this *Brief of Respondent*, by the method(s) indicated below, to the following person(s):

By Messenger to:

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